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PROGRAM First Line Report

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SUBJECT Commentary by Robert Shackne on the Wilson Trial

ROBERT SHACKNE: The lawyer for Edwin Wilson said at one point that his trial, if it came about, would shake the CIA to its foundations, that to defend himself on charges of illegally helping Libya's Colonel Qaddafi, Wilson would have to make public all kinds of covert CIA operations he was involved in, operations still classified secret.

It's not the first time such a tactic has been used. "Graymail" was a major legal problem in the post Watergate days when the government tried to prosecute former CIA Director Richard Helms for perjury and former FBI Director L. Patrick Gray for authorizing illegal break-ins. Rather than risk disclosing secrets, prosecutors called off a number of related cases.

In the Wilson case, however, prosecutors are armed with a new law Congress passed two years ago to deal with graymail. It's a law that's never really been tested; its constitutionality will almost certainly be challenged. Under its provisions, a defendant must disclose to the judge before trial the classified information he wants to use. In proceedings that are secret, with press and public excluded, the judge first rules on whether the classified material is relevant. If it is, the judge then can require the material to be summarized and sanitized before it's disclosed in trial.

Wilson's lawyer says the law is unconstitutional because it will deprive his client of his right to public trial, to due process and to free speech. The argument, in essence, is that the jury must have all the information, including the classified information, before it can reach a verdict.

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In Wilson's case, he's claiming that what he did in Libya was sanctioned by CIA and Pentagon, and to prove that he'll have to disclose secret CIA operations. In court papers, he's asked for testimony from Vice President Bush, Egyptian President Mubarak. He wants the CIA to disclose information he passed on to the agency about Libya and the Middle East and about his 25 year career in covert operations for the CIA and naval intelligence.

Prosecutors will be arguing that that's all a graymail smokescreen, that it has nothing to do with what Wilson did in Libya later on, and that a judge in closed session should decide the issue.

Clearly, if Wilson is allowed to make public what he wants to bring into court, there won't be a trial. The material is much too sensitive. If he isn't allowed to, there certainly will be an appeal on the grounds that the new graymail law has denied him a fair trial.

Now this.

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SHACKNE: This has been First Line Report. I'm Robert Shackne, CBS News.